(6) (5)

Nos. 89-1433, 89-1434

IN THE

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA,

Appellant,

v.

SHAWN D. EICHMAN, *et al.*

UNITED STATES OF AMERICA,

Appellant,

v.

MARK JOHN HAGGERTY, *et al.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF WASHINGTON

Amicus Brief of Governor Mario M. Cuomo in Support of Appellant

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THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1990
(3948)

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Statement of Interest

The Governor of the State of New York, Mario M. Cuomo, submits this brief in support of the position taken by Appellant, the United States of America, that the Flag Protection Act ("Act") does not violate the first amendment. The Governor has a strong and direct interest in this litigation. He has submitted to the New York Legislature a Governor's Program Bill that is substantially identical to the Act. Prior to the development of the Act by Congress, the Governor submitted a predecessor Program Bill that advanced the approach of a content-neutral, unconditional rule of protection that Congress has now adopted. The original Program Bill was conformed to the Act in order to promcte consistency in State and Federal enforcement.

The Governor's Program Bill will not be considered by the Legislature unless the constitutionality of the Act is sustained. The Governor is eager to see his proposal considered and enacted. As governor of perhaps the most diverse state in the nation, *amicus* has a strong appreciation for the power of the flag as a symbol of our national unity. He believes that a prohibition on intentional destruction of the American flag is needed to preserve the flag as a symbol of national unity and is reasonable in light of the unique place the flag holds in our history and traditions and the minimal impact of the prohibition on the opportunity for expression.

For these reasons, the Governor believes it is desirable to protect the physical integrity of the flag if that can be done consistent with the first amendment. Based on the legal

argument set forth in this brief, the Governor respectfully submits that the Act achieves that objective.[1]

Summary of Argument

The Act has been crafted to cure the specific constitutional defect this Court found in the Texas statute considered in *Texas v. Johnson*, 109 S.Ct. 2533 (1989). It protects the physical integrity of the flag regardless of whether any communication that gives offense is involved. Because the Act, unlike the Texas statute, does not require proof that the destruction of the flag of the United States would offend, this Court should scrutinize anew the governmental interests that support protecting the physical integrity of the flag and review whether the pursuit of those interests in the Act abridges freedom of speech.

The standard for that scrutiny is set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). To be sustained, the Act must advance an important or substantial governmental interest. That interest must be unrelated to the suppression of expression and any incidental impact that the Act has on expression must be no greater than necessary to achieve the legitimate objective. All these requirements are met here.

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[1] In addition, if the Act is struck down, there will be a serious and profound impact on New York and other states because such a ruling would almost certainly trigger a divisive battle in Congress and in the States over whether a constitutional amendment to permit a ban on flag burning should be passed. Of course, this Court should not let its ruling be based on projected political reactions. Yet, if this Court finds that the Act is unconstitutional, but has a curable defect, *amicus* urges this Court to be clear in its ruling so that governors, members of Congress and state legislatures, and citizens of this nation are not left with the false impression that the only means to protect the American Flag is to amend the first amendment for the first time in our nation's nearly 214-year history.

ARGUMENT

I. The Act Cures the Specific Constitutional Defects Identified in *Texas v. Johnson.*

In *Texas v. Johnson,* 109 S.Ct. 2533 (1989), this Court struck down a provision of Texas state law forbidding the "desecration" of an American flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover the action."[2] This Court refused to sustain the Texas law under the *O'Brien* test because it found that Texas's asserted governmental interest was related to the suppression of free expression. This Court based this determination on the fact that enforcement of the law was conditioned on an act of flag destruction having a communicative aspect.[3] Having found the Texas statute to be a content-based restriction of political speech, this Court subjected Texas's asserted interest to " 'the most exacting scrutiny.' [citations omitted]" 109 S.Ct. at 2543, and found it insufficient to override the identified free speech interest.

The Act avoids the constitutional defects this Court found in the Texas statute by banning all physical assaults on the flag regardless of whether any communication is involved.[4] The Act would apply equally to a flag burning that was done in private and designed not to convey any message at all. Thus, because the Act, unlike the Texas statute, is not dependent on any communicative message, it is appropriate for the Court to take a fresh look at the

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[2]Tex. Penal code (1989), §§ 42.09(a)(3); 42.09(b).

[3]"[Johnson] was prosecuted for his expression of dissatisfaction with policies of this country, expression situated at the core of our First Amendment values. . . . Moreover, Johnson was prosecuted *because* he knew that his politically charged expression would cause 'serious offense.' " 105 S Ct. 358 (emphasis added).

[4]Flag Protection Act of 1989, Pub.L. No.101-131, 103 Stat. 777; 18 U.S.C. 700(a)(1).

asserted governmental interests a state or Congress could have for enacting such a content-neutral flag protection law and to consider whether this prohibition meets the three part *O'Brien* test described above.

II. The Act Satisfies the *O'Brien* Test.

A. The Governmental Interest in Protecting a Unique Symbol of National Unity is Important and Substantial.

Government frequently passes laws and uses official time and resources to establish symbols and ceremonies that express our patriotism and national unity. The Washington monument is maintained on federal property to express the pride we feel in our great Revolutionary War commander and first President. The Lincoln memorial expresses our values of national unity and freedom for all people regardless of the color of their skin. The Bicentennial celebrations of our independence, of our Constitution, and of our Bill of Rights, as well as our Memorial Day and Fourth of July ceremonies are only a few more examples of the varied and diverse ways in which government acts to promote symbols and ceremonies because of the patriotic and unifying national values they express.

While all these activities are important, the government's interest in establishing and promoting the flag as a symbol of national unity is particularly substantial. The flag is unique—the dominant symbol of our national identity and national unity. Only the flag flies every day in every major public office and major public forum in every corner of our nation. Our most basic patriotic ceremony is to pledge allegiance to the flag and to the Republic for which it stands. The flag marks our greatest national achievements as when it was placed on the moon by our astronauts. It is the flag that drapes the coffins of fallen Americans who

served us, whether they be a fallen President slain by an assassin's bullet or an ordinary soldier who died fighting for his or her country.

These facts establish that government has acted to create and promote the flag as the unique national symbol. Government's interest in doing so is not only substantial, it is fundamental. The establishment and promotion of this symbol creates of course an emblem of nationhood. As the unique national symbol, it is a key means of encouraging concern for the country and the common good of all the people. We submit that the "substantial and important" part of the *O'Brien* test is plainly met.

B. The Governmental Interests Advanced in the Act Are Not Related to Suppression of Expression.

The "unrelated to suppression of expression" prong of the *O'Brien* test is also clearly met. The government's interest in protecting the American flag because of its importance as a unique and unifying national symbol is not dependent on whether those who might burn or mutilate it do so as a means to deplore lack of popular support for the military, protest appeasing foreign policies or merely to make a nihilistic statement. When Congress, or a state like New York, passes a content-neutral law protecting the flag, government is explicitly expressing that it has an interest in preserving the flag regardless of whether those who would threaten its physical integrity do so out of agreement or disagreement with any idea. There is no reason for this Court to conclude that this law is in any way aimed at dissent or at a particular view or at any particular content of expression.

Nor is destroying the flag inherently anti-government and the prohibition on its destruction inherently pro-government. Destroying the flag can equally be intended to

deplore lack of popular support for governmental policies. Indeed that seems to have been the case with the flag burning at issue in *Street v. New York*, 394 U.S. 576 (1969). In the words of Thomas Jefferson, this is not a law designed "to silence by force and not by reason the complaints or criticisms, just or unjust, of our citizens against the conduct of their agents."[5] Rather it is a law whose restrictions on expressive conduct are incidental to a wholly legitimate and proper governmental purpose.

C. The Incidental Interference of the Act with Expression is Minimal and No Greater than Necessary.

The third prong of the *O'Brien* test—that the restriction be no greater than necessary—is easily met here not only because the Statute is targeted to protecting a unique national symbol but also because any incidental restriction on expression is truly minimal. The Act will not discourage vigorous dissent or silence any speaker or message. Thus, even though it may have the incidental impact of limiting one very specific mode of expression, the law cannot be viewed as having a significant effect on expression generally and no impact whatsoever on restricting dissent.

First, it is important to note that the Flag Protection Act does not prohibit the effective communication of any particular idea or message. Burning the flag, at most, is conduct that expresses a vague general disagreement with something associated with the United States. To the extent that a flag burning communicates a particular message, it is the surrounding speech that does so. All of the words, posters, handbills and publicity that give a "flag burning event" some communicative meaning are still entirely protected. There is no danger that the Act would affect speech

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[5] T. Jefferson, *Writings* 1057 (M.Peterson ed. 1984).

and expressive conduct that are essential for vigorous protest and dissent.[6]

Second, and closely related, the Act does not deny any group a means of communication—such as marching—that has historically been used as a visible means for mass protest.

Third, the Act in no way closes off avenues of expression that are vital to the practical ability of some types of speakers to communicate. At times this Court has overturned laws or ordinances designed to promote legitimate governmental interests because such laws would impact too harshly on the ability of some groups to engage in meaningful expression. Thus, this Court has struck down bans on door-to-door solicitation or handbill distribution because of the importance such avenues of expression hold for those who are poor or who seek to deliver their religious message door-to-door and town-by-town. *Murdock v. Pennsylvania,* 319 U.S. 105 (1943); *Schneider v. State of New Jersey,* 308 U.S. 147 (1939). The Act would have no such impact on any such identifiable group of speakers.

Fourth, the Act in no way closes off any of the identified types of public forums this Court has recognized historically as deserving of special protection. *Cornelius v. NAACP Legal Defense Fund,* 473 U.S. 788, 802 (1985).

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[6] In fact, although burning a draft card, standing alone, is a far clearer communicative statement about opposing the draft than is burning the flag about any specific message, this Court had little problem in finding that the impact of restrictions on that form of expressive conduct did not outweigh the asserted governmental interest. *United States v. O'Brien,* 391 U.S. 367 (1968). And while the availability of alternative methods of speech cannot standing alone justify a restriction on expressive conduct, *Spence v. Washington,* 418 U.S. 405, 411 n.4 (1974), this Court has often recognized that this is a legitimate consideration when balancing governmental and free speech interests. *Frisby v. Schultz,* 108 S.Ct. 2495 (1988).

Fifth, promotion of a symbol of national unity does not constitute the imposition by the government of a preferred or orthodox view of how citizens must think or feel. When we honor what America stands for, we honor our rights to speak freely, to take unpopular positions and to disagree vigorously with our government. Indeed, Americans often exhibit their patriotism by encouraging government to change their policies to ones more consistent with their view of American values.

Finally, it is important to note that the Act in no way compels any person to engage in any speech offensive to his or her religious or personal views or to in any way "be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley v. Maynard,* 430 U.S. 705, 713-716 (1977); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 633-34 (1943).

Any incidental impairment on expressive conduct that the Act may cause is unavoidable if government is to make an effort with broad-based credibility to ensure that the flag fulfills its role as a unique symbol of national unity. To serve this unique symbolic role, the flag must be a protected symbol, set apart and placed above the fray. To function as a symbol of national unity the flag must be allowed to be meaningful in different ways for different people. It must be an object that no one group can claim as its own to cherish or destroy. An unconditional rule of protection is the most reasonable way to achieve this objective.

Indeed, this is the fundamental teaching of *Texas v. Johnson.* There the prohibition against destroying the flag was directed only at those whose action would give offense to the community. That is not a proper approach in a country that values and protects strong dissent. In contrast, the unconditional rule of protection embodied in the Act is neutral with regard to all groups.

The Act is thus narrowly drawn to promote Congress' substantial and non-suppressive interest in preserving the physical integrity of the flag in all contexts. In light of the unique symbolic role the flag plays in expressing our patriotism and national unity, this Court should find that the governmental interest in protecting its physical integrity is sufficient to justify any incidental impact the Act may have on expressive conduct.

CONCLUSION.

For the foregoing reasons, the judgment of the United States District Court for the District of Columbia and the judgment of the United State District Court for the Western District of Washington should be reversed.

Respectfully submitted,

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